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In The

Supreme Court of the United States

October Term, 1973

No. 73-1032

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "The Nevele",

Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioners, Ben J. Slutsky and Julius Slutsky, d/b/a The Nevele, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 24, 1973.

Opinion Below

The opinion of the Court of Appeals is not yet reported but is reprinted in our Appendix.

Jurisdiction

Following a jury trial on January 9, 1973 the petitioners were found guilty in the United States District Court for the Southern

District of New York of attempted income tax evasion and filing false tax returns in violation of 26 U.S.C. §§7201, 7206(1).

On March 19, 1973 each of the petitioners was sentenced to five years imprisonment. A $40,000 fine was imposed upon Ben Slutsky and a $35,000 fine was levied against Julius Slutsky. The cost of the prosecution was imposed on each petitioner.

On September 24, 1973 the Court of Appeals for the Second Circuit affirmed petitioners' convictions of tax evasion but reversed and vacated the false filing convictions. This modification reduced the fines imposed to $30,000 for each of the petitioners but left the prison sentences unaltered.

A petition for rehearing was denied on October 31, 1973. This Court extended the petitioners' time for filing our petition until December 31, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Does the exclusive use of the "bank deposit" method of reconstructing income in a tax fraud prosecution, as applied in this case, violate the petitioners' presumption of innocence as guaranteed by the fifth amendment?

Statutory Provision Involved

Title 26 United States Code §7201:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Statement of Facts

The facts relevant to the issues presented by this tax evasion case, although complex, can be simplified. Accordingly, we have recruited only the most essential facts from the complicated record below.

Benjamin and Julius Slutsky are brothers and general partners in the ownership and operation of the Nevele Hotel in Ellenville, New York (35).[1] The Nevele is one of the largest and most famous resort hotels in the Catskills with an 18-hole golf course, indoor and outdoor swimming pools, ice skating rink, ski slope, and other recreational facilities (64).

The Nevele Bookkeeping System

The petitioners' accountant, Samuel Levis, instructed the Nevele employees how to properly record all guest income (174). He reviewed the records, analyzed the income and expenses, and generally spent one day each week in connection with these duties. He prepared the Nevele partnership tax returns from information contained in the records and from the trial balances supplied to him by the chief bookkeeper. All receipts were entered in the billbooks which were maintained and accounted for in sequence. And the subsequent crediting to the Nevele's cash receipts book provided a built-in control to insure the proper entry of all guest income.

Although Levis testified that he did not examine each billbook and tie it into the cash receipts book, he explained, "I did sufficient testing to satisfy myself that the income was reported and recorded" (215). Levis also stated that from his periodic examination of the Nevele books from 1965 through 1967 he was satisfied that all Nevele income was correctly reflected on the Nevele books and was properly reported on the Nevele partnership returns (178-179).

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[1] Refers to petitioners' Appendix filed in the Second Circuit.

The Tax Investigation

In 1969 the Internal Revenue Service began a tax investigation of the Nevele Hotel using solely as its basis the bank deposit method of reconstructing income.[2] The government investigated six bank accounts related either to the Nevele or the Slutsky brothers. However, the investigation eventually focused on the two major business accounts maintained in the name of the Nevele in the First National Bank and Trust Company of Ellenville and the Ellenville National Bank.[3] There were deposits of $14.8 million in these two central accounts for the three-year period 1965 through 1967.[4]

The government only investigated deposits in these accounts of checks *over* $1,000, which totalled $5.3 million. The government found $3.8 million to consist of *non-income* items. Accordingly, the prosecution merely reduced the total deposits of $14.8 million by $3.8 million and charged the balance of $11 million to gross receipts.[5] This amount was then discounted by the direct costs, expenses and depreciation claimed on petitioners' tax return. Without investigating additional non-income deposits, for which explanations were furnished by petitioners, the government arbitrarily claimed $1.2 million as unreported income.

The most shocking event in this litigation occurred when the government flatly refused to investigate the petitioners' leads

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[2]The bank deposit method involves tabulating all deposits made in bank accounts under the control of a taxpayer, excluding easily identifiable non-income items. The balance is then charged as income.

[3]The four other bank accounts explored by the government were: a bank account in the Sullivan National Bank; a savings account under the name of Julius and Benjamin Slutsky; a Julius and Alice Slutsky checking account; and an Alice Slutsky checking account. The latter three accounts are maintained in the Ellenville National Bank.

[4]For ease of comprehension, we have rounded off all these bank deposit figures.

[5]The $11 million consisted of $1.5 million in checks over $1,000; $8.5 million in checks under $1,000; and $1 million in cash.

concerning the $8.5 million in checks *under* $1,000, which included the $1.2 million charged in the indictment. Consequently, it is undisputed that this huge amount charged as income against the petitioners was never verified.[6] For as the Court of Appeals concluded:

> "Almost $8.6 million, however, was in unidentified items, and a further $1 million was in currency. Appellants' principal attack on the sufficiency of the government's investigation focuses on this large sum of unidentified checks and currency charged as income." (A-14)

The government for the first time in their brief in the Second Circuit claimed that they identified, but did not investigate 1,447 checks out of the $8.5 million amount. However, they only verified *eight* of the 1,447 checks. There is no evidence to support this claim.

The great extent to which checks in those accounts remained unverified is reflected in Government's Exhibits 124-126. Those exhibits show that for three years over $8.5 million in checks under $1,000 were deposited in these accounts but were unidentified. The government simply charged the entire amount to the petitioners as income. Similarly, and also with no analysis whatever, the government charged cash deposits in these accounts of over $1 million as income to petitioners. The following chart illustrates the enormity of this failure to investigate.

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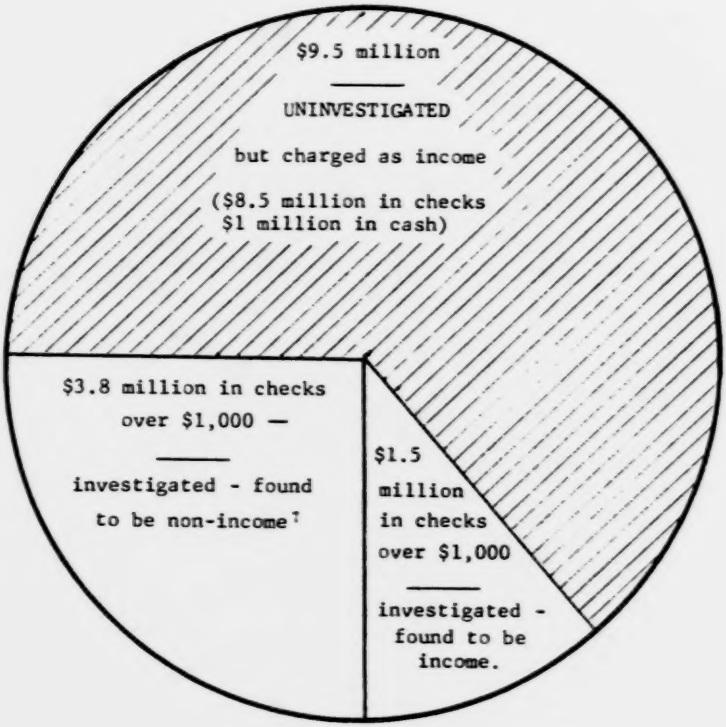
[6]When the government agents were asked why they had not investigated the $8.5 million in checks, they merely stated "... it would require the examination of hundreds of thousands of boxes of microfilm" (318). Significantly, the government admitted that they had the manpower to conduct such an investigation but declined to do so because they assumed all the money deposited in these business accounts was income (318, 327).

$14.8 Million Total Deposits in the FIRST NATIONAL BANK & TRUST COMPANY and the NATIONAL BANK OF ELLENVILLE



[1] Of the $5.3 million in checks over $1,000 investigated by the government, 72% were found to be non-income items.

Non-Income Items in the $8.5 Million

A resort hotel is unique since it is designed to accommodate its guest's every need. Consequently, the Nevele was called upon to cash an unusual number of guest checks to provide cash for tips and other necessities. Furthermore, the Nevele Hotel cashed payroll checks totalling $15,000 to $20,000 a week (152, 206, 207). In this three-year period, $2.3 million in payroll checks was deposited in the Nevele accounts. The Nevele maintained large sums of cash, withdrawn from its various accounts, to accommodate these check cashing requirements. An investigation would have disclosed those redeposits as non-income (150, 217).[8] Other non-income items travelling through these two bank accounts consisted of guest rebates, payments received on behalf of concessionaires,[9] borrowed money, funds accumulated from earnings of prior years, recovery of loans made in prior years, deposits of cash previously withdrawn from the accounts, transfers between bank accounts, gifts, return of capital, proceeds from insurance, redeposits of bad checks and other such transfers.

Petitioners' Savings Account

A savings account in the name of Julius Slutsky or Ben Slutsky maintained at the Ellenville National Bank, and the two checking accounts in the names of Julius and Alice Slutsky at the Ellenville National Bank, were fully investigated by the

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[8]Significantly, fourteen checks deposited in the Ellenville National Bank on May 18, 1966 consisted of the following amounts: $80.76, $62.09, $232.56, $334.35, $35.09, $160.24, $75.68, $76.12, $80.72, $72.32, $83.40, $18.40, $25.00 and $80.72. These fourteen checks are illustrative of the small dollar amounts of the payroll checks cashed and deposited in these two business accounts. They appeared on a microfilm roll involving checks over $1,000 and, though physically seen, were never analyzed and verified.

[9]For example, if a guest purchased $75 worth of clothing in one of the shops on the Nevele premises, this amount would be included in his hotel bill. When he departed, he would pay his hotel bill in full, but the hotel would then disburse $75 in cash to the concessionaire after having deposited the full payment in their account. This is an item that would undoubtedly be under $1,000 and should have been deducted from the Nevele's income.

government and analyzed by petitioners' accountant. Those studies showed that 99 percent of those funds were properly accounted for (Defs.' Exhibits 6Zs, 7Bs).

On September 24, 1973 the Second Circuit affirmed the petitioners' convictions with the exception of the false filing counts. The court concluded that the petitioners could not be convicted of false filing and attempted evasion of taxes, and reversed the convictions on those counts.

REASONS FOR GRANTING THE WRIT

POINT I

The exclusive use of the "bank deposit" method of reconstructing income in a tax fraud prosecution, as applied in this case, violates the petitioners' presumption of innocence as guaranteed by the fifth amendment.

Petitioners' convictions raise the gravest constitutional doubts, and more than any other case filed with this Court, demonstrate the dangers inherent in the bank deposit method of prosecuting a tax fraud case. This is the first case we know of to reach this Court where the *sole* means of reconstructing income was based upon a business' bank deposits.

It is undisputed that the government merely tabulated all the petitioners' bank deposits, and after reducing that sum by easily identifiable non-income items, charged the entire remaining amount as income without any reasonable basis for doing so. The government grievously failed to investigate $8.5 million in check deposits after the petitioners had explained that a large part of that sum was made up of non-income items. Thus, an intolerable burden was cast on the taxpayers to come forward and prove that tens of thousands of checks were not income.

This inexcusable shifting of the burden of proof has overrun the borders of the petitioners' presumption of innocence and is incompatible with this Court's carefully drawn decree in *Holland* v. *United States*, 348 U.S. 121 (1954). The approval of this ill-conceived tax prosecution would needlessly endanger honest taxpayers everywhere.

The *Holland* Case

The watershed case governing the use of circumstantial evidence in establishing tax fraud prosecutions is *Holland* v. *United States*, *supra*. There, this Court, although approving the net worth method of prosecution, was careful to point out:

> "Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use. . . . This has led many of our courts to be disturbed by the use of the net worth method, particularly in its scope and the latitude which it allows prosecutors." (348 U.S. at 125, 126)[10]

In our case there were no missing records, and the accountant for the Nevele forthrightly testified that all income items were fully and accurately reported. A complete and unimpeachable explanation was given to the Internal Revenue Service about how the Nevele's income was properly recorded. Furthermore, the government was advised that there were many

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[10]This Court went on to stress in *Holland*:

> ". . . Although it may sound fair to say that the taxpayer can explain the 'bulge' in his net worth, he may be entirely honest and yet unable to recount his financial history. In addition, such a rule would tend to shift the burden of proof. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government's case by showing loose business methods or losing the jury through his apparent evasiveness.
>
> * * *
>
> "While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. . . . Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute." (348 U.S. at 128, 129)

non-income items mixed in with the $8.5 million in checks. The government knew from its own investigation that 72 percent of the checks over $1,000 consisted of non-income items. (*See* chart at 6, *supra*.)

Since the $8.5 million was cloaked with the presumption of innocence, all income items contained in those funds were presumed to be properly reported. The government's failure to adequately investigate these items was unpardonable. To compel the petitioners in a criminal proceeding to prove tens of thousands of items as non-income emasculates *Holland*. This case more than any other demonstrates the immense mischief such a rule can produce.

Recently, this Court stressed the importance of the presumption of innocence and the burden prosecutors must bear in proving criminal cases in *In re Winship*, 397 U.S. 358 (1970), by declaring:

> "... 'a person accused of a crime ... would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.' " (397 U.S. at 363)

This language is particularly relevant because the court below in effect employed a civil test, holding that:

> "*Once the Government proves unreported receipts having the appearance of income*, and gives the defendant credit for the deductions he claimed on his return, as well as any others it can calculate without his assistance, *the burden is on the defendant to explain the receipts, if not reportable income*, and to prove any further allowable deduction not previously claimed." (A-16)

The Second Circuit thus did not require the government to adhere to the strict standard of proof mandated by *Winship* and its predecessors.[11]

Most regrettably, the circuit court omitted from this misconceived rule the essential requirement that the government fully investigate leads furnished by the taxpayer. Consequently, the petitioners' presumption of innocence was left in ruins by this unfortunate distortion of the *Holland* rule. Therefore, a full review of this case is urgently needed.

The constitutional failures inherent in the bank deposit method of reconstructing income are manifest. In a net worth case the taxpayer may be called upon to explain the acquisition of a handful of assets, such as a house, car, securities, and other forms of personal property. However, the businessman in a bank deposit case is forced to furnish explanations for hundreds of thousands of items over a three-year period. This shifts to him an unbearable burden of proof which in many instances can be neither physically borne nor adequately financed.

This case is a startling example and deserves this Court's attention. When the government was asked why it did not investigate all the checks under $1,000 included in the deposits of $8.5 million, it pathetically complained that examining thousands and thousands of boxes of microfilm would simply take too long. Why then must the taxpayer bear this burden?

Here the petitioners explained that a substantial part of the $8.5 million consisted of checks cashed by employees and guests, payments received on behalf of concessionaires, guest

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[11] *Griffin* v. *California*, 380 U.S. 609 (1965); *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958); *Holland* v. *United States*, 348 U.S. 121, 138 (1954); *Leland* v. *Oregon*, 343 U.S. 790, 795 (1952); *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949); *Michaelson et al.* v. *United States*, 266 U.S. 42 (1924); *Wilson* v. *United States*, 232 U.S. 563, 569-570 (1914); *Holt* v. *United States*, 218 U.S. 245, 253 (1910); *Davis* v. *United States*, 160 U.S. 469, 488 (1895); *Coffin* v. *United States*, 156 U.S. 432 (1895); *Miles* v. *United States*, 103 U.S. 304, 312 (1880).

rebates, and other non-income items. These items were "reasonably susceptible of being checked."[12] Nevertheless, the government stubbornly refused to abide by this Court's directions. As a consequence, this Court's understandable fears over the misuse of the *Holland* doctrine have all too soon been fulfilled. These convictions more than any others deserve to be reviewed so that a stop can be put to the erosion of the presumption of innocence. If the petitioners' plea is ignored there will be no end to the abuse of this inherently dangerous doctrine.

Between 1970 and 1972 more than 7,503 federal tax fraud investigations were launched in this country.[13] The bank deposit method of proof is increasing in popularity because of the obvious advantages to the prosecution. A grant of this writ is imperative in order to revalidate the *Holland* rule and to end its depreciation.

Conflict in Circuits

Virtually every other circuit court that has considered the bank deposit method of prosecuting tax fraud cases has concluded that this questionable theory requires corroborative proof to support a criminal conviction. An inventory of every tax fraud case we could locate shows that the bank deposit procedure has always been used in combination with a more reliable theory such as "specific item," "net worth" or "expenditures."[14] The Second Circuit stands alone in sustaining a criminal tax fraud

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[12] *Holland* v. *United States*, 348 U.S. at 138.

[13] 1971 Annual Report of the Commission of Internal Revenue at 31, 33; 1972 Annual Report of the Commission of Internal Revenue at 21. There has been a steady increase in tax prosecutions each year.

[14] *United States* v. *Lacob*, 416 F.2d 756 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970); *United States* v. *Procario*, 356 F.2d 614 (2d Cir. 1966), *cert. denied*, 384 U.S. 1002 (1966); *Morrison* v. *United States*, 270 F.2d 1 (4th Cir. 1959), *cert. denied*, 361 U.S. 994 (1959); *United States* v. *Frank*, 245 F.2d 284 (3d Cir. 1957),

(*Footnote continued on following page.*)

conviction based *exclusively* upon the bank deposit method of reconstructing income.

Furthermore, in *Kirsch* v. *United States*, 174 F.2d 595 (8th Cir. 1949), and *United States* v. *Paschen*, 70 F.2d 491 (7th Cir. 1934), the government, as in our case, contended that a large number of unidentified deposits in a business bank account may be assumed to be unreported income. Both the Eighth and Seventh Circuits correctly concluded that too much speculation was involved to presume that such a large unidentified balance was income. Our situation is no different. Consequently, there is a dramatic division in the circuits requiring this Court's intervention to resolve this critical conflict.

Under the *Holland* rule an accused need not assume the burden of proving his innocence unless the government has established beyond a reasonable doubt that there are no non-taxable components among the bank deposits. Here the government made no attempt at all to negate reasonable and compelling explanations establishing the non-income features of this $8.5 million.

(*Footnote continued from preceding page.*)

cert. denied, 355 U.S. 819 (1957); *United States* v. *Doyle*, 234 F.2d 788 (7th Cir. 1956), *cert. denied*, 352 U.S. 893 (1956); *Kirsch* v. *United States*, 174 F.2d 595 (8th Cir. 1949); *Gleckman* v. *United States*, 80 F.2d 394 (8th Cir. 1935), *cert. denied*, 337 U.S. 709 (1939); *United States* v. *Paulak*, 352 F. Supp. 794 (S.D.N.Y. 1972).

Although some courts have erroneously concluded that the bank deposit method is constitutionally adequate, a careful examination of those cases discloses some corroboration in the form of a "specific item" or "net worth" theory. *United States* v. *Stein*, 437 F.2d 775 (7th Cir. 1971); *United States* v. *Mansfield*, 381 F.2d 961 (7th Cir. 1967), *cert. denied*, 389 U.S. 1015 (1967); *United States* v. *Moody*, 339 F.2d 161 (6th Cir. 1964); *Percifield* v. *United States*, 241 F.2d 225 (9th Cir. 1957); *Beard* v. *United States*, 222 F.2d 84 (4th Cir. 1955), *cert. denied*, 350 U.S. 846 (1955); *J.L. Holbrook* v. *United States*, 216 F.2d 238 (5th Cir. 1954), *cert. denied*, 349 U.S. 915 (1955); *Hoyer* v. *United States*, 223 F.2d 134 (8th Cir. 1955); *Graves* v. *United States*, 191 F.2d 579 (10th Cir. 1951); *Stinnett* v. *United States*, 173 F.2d 129 (4th Cir. 1949), *cert. denied*, 337 U.S. 957 (1949).

The constitutional objective of the "leads" rule is that it places on the government the affirmative obligation to check reasonable leads inconsistent with guilt and produce evidence showing the implausibility of such explanation. Valid and persuasive leads were freely given to the government by petitioners, but it peremptorily refused to study them claiming it would involve the examination of thousands and thousands of boxes of microfilm.

In sharp contrast to this case, the government in a net worth investigation in *Beard* v. *United States*, 222 F.2d 84 (4th Cir. 1955), analyzed bank deposits, meticulously inspecting "hundreds of thousands of items" on microfilm covering a three-year period. The agents tabulated each of the items, showing the name of the bank, the drawer, the payee, and the amount. Thus, there is precedent for hard work by the government.

Furthermore, the prosecution's finding that 72 percent of the checks over $1,000 were non-income items makes irresistible the conclusion that a comparable ratio would apply to the checks under $1,000. Unquestionably, the identification of even half of the deposits as non-income items would eliminate the deficiency charged in the indictment. The government's failure to examine and verify those leads is unforgivable, and was in direct defiance of this Court's mandate in *Holland*. *See also Kirsch* v. *United States*, 174 F.2d 595 (8th Cir. 1949), and *United States* v. *Paschen*, 70 F.2d 491 (7th Cir. 1934). Accordingly, because of the serious conflict among the circuit courts on this crucial issue and because of the unconstitutional application of the *Holland* rule, this petition should be granted.

The Circuit Court's Misconception

The Second Circuit mistakenly concluded that the government's claim of a random sampling of 1,447 checks in amounts less than $1,000 was correctly made and that the analyzed items

were found to constitute income in virtually every instance. Regrettably, the government smuggled into the Second Circuit this sampling claim, never subjected to challenge, without any support in the trial record. However, considering this questionable evidence on its face, it must be emphasized that the government only *identified* 1,447 checks without ever investigating those items. All they verified were eight specific checks, hardly a reliable sampling.

The circuit court sustained the petitioners' convictions on an altogether different theory than the government argued in the trial court. There the prosecution urged that the petitioners did not report all of the Nevele's gross receipts but diverted and deposited them in personal bank accounts. However, after the petitioners offered uncontradicted proof at trial that virtually all of these funds were reported as income, the government in its brief introduced a new theory of proof based upon a system of parallel entries. (Govt.'s Brief at 25-26.) This new theory was then embraced by the circuit court. (Slip op. at 5275.) Consequently, the affirmation of the petitioners' conviction was counterfeit. *Bollenbach* v. *United States*, 326 U.S. 607 (1946); *Wilson* v. *United States*, 250 F.2d 312 (9th Cir. 1958).

Furthermore, the Second Circuit's use of the label "unrecorded accounts" in describing the private accounts of the Slutskys is most misleading. Although these may have been used as business accounts, it is immaterial that they were not recorded on the Nevele's books. All income which filtered into these accounts was fully reported to the government and could be easily traced to the Nevele ledgers.

Apparently, the circuit court lost its footing on the slippery slopes of *Holland* and fell into a terrible misjudgment by contriving a new rule which will produce terrifying consequences. The Court of Appeals has decreed that once the government proves unreported receipts having the *appearance* of income, ". . . *the burden is on the defendant to explain the receipts, if*

not reportable income, and to prove any further allowable deductions not previously claimed" (A-16). This dangerous rule disparages this Court's carefully circumscribed principle housed in *Holland*. For there the Court carefully provided:

> "Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes." (348 U.S. at 138)

Conspicuously missing from the Second Circuit's opinion is any mention of petitioners' explanations to the government about the vast amounts of non-income items in the $8.5 million accounts. The circuit court's decision has shaken the *Holland* rule to its very foundation. If these untenable bank deposit procedures are not quarantined, they will spread like a pestilence through other tax prosecutions across the country.

And finally it must be said that courts are obliged to firmly hold prosecutors to their duty of proving cases beyond a reasonable doubt before two elderly men can be clapped in prison for five years. Civilized standards of justice require that degree of proof or no man will be safe.

The government's monopoly of investigative agencies in criminal cases today makes it a far more efficient fact-gathering adversary than a decade ago. Accordingly, the presumption of innocence and proof beyond a reasonable doubt assume even greater importance and must not be allowed to deteriorate. To allow the conviction of these two businessmen upon this impoverished proof is shameful. If this judgment is allowed to stand, the pages of our judicial history will not recall any episode so critical in character or so expansive in scale.

Conclusion

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Second Circuit Opinion
September 24, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1037, 1038—September Term, 1972.

(Argued June 25, 1973 Decided September 24, 1973.)

Docket Nos. 73-1549, 73-1550

UNITED STATES OF AMERICA,

Appellee,

v.

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "The Nevele",

Appellants.

Before:

LUMBARD, HAYS and TIMBERS,

Circuit Judges.

Appeals from judgments of conviction after jury trial in the Southern District of New York, Lloyd F. MacMahon, *District Judge*, finding both appellants guilty of signing and filing false partnership income tax returns, and of attempting to evade personal income taxes.

Affirmed as to convictions on tax evasion counts; reversed and vacated as to convictions on false filing counts.

LOUIS BENDER, New York, N.Y. (Sandor Frankel, New York, N.Y., on the brief), *for Appellant Ben J. Slutsky.*

Second Circuit Opinion

WILLIAM ESBITT, New York, N.Y. (Edward Brodsky and Edwin L. Schwartz, New York, N.Y., on the brief), *for Appellant Julius Slutsky.*

JOHN J. TIGUE, JR., Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., Robert P. Walton and John W. Nields, Jr., Asst. U.S. Attys., New York, N.Y., on the brief), *for Appellee.*

TIMBERS, *Circuit Judge:*

Ben J. Slutsky and Julius Slutsky appeal from judgments of conviction entered upon jury verdicts returned January 9, 1973 after a six day trial before Lloyd F. MacMahon, *District Judge,* in the Southern District of New York. Each appellant was found guilty on three counts of attempted personal income tax evasion, in violation of 26 U.S.C. §7201 (1970). In addition, Ben J. Slutsky was found guilty on two counts, and Julius Slutsky on one count, of signing and filing false partnership income tax returns, in violation of 26 U.S.C. §7206(1) (1970). On March 19, 1973, a sentence of five years imprisonment and a $40,000 fine was imposed on Ben J. Slutsky, and a sentence of five years imprisonment and a $35,000 fine was imposed on Julius Slutsky. The costs of prosecution were imposed on each appellant. Each has been released on his own recognizance pending appeal.

Of the numerous claims of error raised on appeal, we find the principal issues to be those relating to the sufficiency of the evidence adduced by the government under the "bank deposits" method of proof and the propriety of sentencing appellants for violations of both 26 U.S.C. §7201 and 26 U.S.C. §7206(1).

We affirm the judgments of conviction as to both appellants on the tax evasion counts (Counts 4, 5, 6, 7, 8 and 9); but we reverse and vacate the judgments of conviction and cumulative sentences imposed upon both appellants on the false filing counts (Counts 1, 2 and 3) as an improper pyramiding of penalties.

I.

Facts

Viewing the evidence in the light most favorable to the government, as we must at this stage, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2 Cir. 1972), the jury could have found the facts as follows:

Appellants were the equal and only partners in the Nevele, a large, successful resort hotel located at Ellenville, New York, in the Catskill Mountains. During the years in question appellants were engaged full time in the management of the Nevele.

In 1967, the IRS commenced a routine audit of the Nevele's books. At first it was directed at the taxable years 1964 and 1965. Later it was extended to include 1966 and 1967.[1] The audit, conducted chiefly by Agent Vera Wood, led to the conclusion by the IRS that the tax returns filed by appellants for the years in question had failed to include substantial income sums attributable to the partnership.

Agent Wood's suspicions initially were aroused when, in checking the books of the Golden Gate Hotel,[2] she discovered an "exchange" transaction entry indicating that the

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1 The ensuing indictment, returned November 2, 1972, charged violations only with respect to the taxable years 1965-67. Alleged violations during the year 1964 were not included because of the running of the applicable statute of limitations.

2 The Golden Gate Hotel was a separate partnership of appellants, the income of which was not involved in the instant indictment.

Nevele had satisfied a $136,000 mortgage obligation of the Golden Gate. Recalling no record of any such exchange in the Nevele's books, Agent Wood asked Samuel Levis (the Nevele accountant), John Greco (the full-time bookkeeper), and Ben Slutsky to explain both the accounting treatment of the transaction on the Nevele's books and the source of the sum involved. After a series of unsatisfactory responses by Slutsky, Levis presented to Agent Wood a copy of a bank ledger card for a savings account in the name of Ben or Julius Slutsky. This showed a withdrawal in the amount of $136.000. Agent Wood then confirmed that this savings account was reflected nowhere in the Nevele books. She found, on a rough addition of the amounts in that account and those properly recorded, "that the total of these deposits exceeded the cash that was available as reflected in the cash on hand account of the books".

Appellants first maintained that all of the sums deposited in the savings account had been recorded on the Nevele's books as income. Later they asserted that the deposits did not represent income at all but were advance reservation deposits which were held in escrow until the guests arrived at the Nevele and income actually began to accrue.

Agent Wood then intensified her audit. She discovered two additional unrecorded bank accounts under the control of appellants. At this point, the analysis focused on the following six accounts:

(A) Accounts on Nevele books:

(1) Checking account in name of "The Nevele", at Sullivan County National Bank;

(2) Checking account in name of "The Nevele", at First National Bank and Trust Company of Ellenville;

(3) Checking account in name of "The Nevele", at Ellenville National Bank;

(B) Accounts not on Nevele books:

(4) Savings account in name of "Ben or Julius Slutsky", at Ellenville National Bank;

(5) Checking account in name of "Julius or Alice Slutsky", at Ellenville National Bank;

(6) Checking account in name of "Alice Slutsky", at Ellenville National Bank.

Upon appellants' continued failure satisfactorily to explain the excess of deposits over recorded income, Agent Wood filed a report. The case was referred to the Intelligence Division of the IRS.

The referral culminated in a thorough investigation headed by Special Agent David Empie. This investigation utilized the "bank deposits method". This involves an analysis of all deposits made in bank accounts under the control of the taxpayer, the total of which is adjusted to exclude transfers, loans, redeposits, and other identifiable non-income items. Further subtractions are made for allowable exemptions and deductions. The resulting net taxable income figure is compared against the total taxable income reported.[3] As summarized by the government at trial, the investigation produced the following data in support of the alleged unreported income for each of the three tax years involved:

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3 This method of analysis necessarily closely tracks the requirements of trial proof which we discuss in greater detail later in this opinion under Section III-A. See, e.g., *United States* v. *Lacob*, 416 F.2d 756, 759 (7 Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970).

Ben J. Slutsky et al.

Schedule of Alleged Unreported Income—Nevele

1965, 1966, 1967

Item	*Particulars*	*1965*	*1966*	*1967*
1	Total Bank Deposits	$6,548,213.68	$5,287,062.46	$6,310,260.18
2	Less: Nonincome Deposits and Items	3,283,910.71	998,361.76	1,707,471.99
3	Gross Receipts—Bank Deposit Method	3,264,302.97	4,288,700.70	4,602,788.19
4	Cash-on-hand			
	Less: Balance—beginning of year	78,688.84	193,346.46	206,772.39
	Sub-Total	3,185,614.13	4,095,354.24	4,396,015.80
	Add: Balance—end of year	193,346.46	206,772.39	unknown
5	Gross Receipts—Bank Deposit Method (adjusted)	3,378,960.59	4,302,126.63	4,396,015.80
6	Less: Direct Costs claimed on returns	2,146,562.42	2,746,645.27	2,771,463.63
7	Gross Profit	1,232,398.17	1,555,481.36	1,624,552.17
8	Less: Other expenses and depreciation claimed on returns	976,988.28	966,183.80	1,181,760.18
9	Partnership ordinary income as corrected	255,409.89	589,297.56	442,791.99
10	Partnership ordinary income as reported	(143,767.32)	111,387.09	87,816.67
11	Unreported Income	$ 399,177.21	$ 477,910.47	$ 354,975.32

The tax effect of the unreported income set forth in this summary was to increase the partnership share of each appellant by $199,588.60 for 1965; $238,955.23 for 1966; and $177,487.66 for 1967. This resulted in a total alleged personal tax deficiency for the three years involved of $369,136.83 for Julius Slutsky and of $391,945.19 for Ben Slutsky.

A nine count indictment was returned November 2, 1972.[4] At trial, the government claimed that the large deficiencies

4 Count 1 charged Julius Slutsky with making and subscribing to a false partnership income return for the year 1965. Counts 2 and 3 charged Ben Slutsky with making and subscribing to false partnership income returns for the years 1966 and 1967. Counts 4, 5 and 6 charged Julius Slutsky with wilfully attempting to evade personal income taxes for the years 1965, 1966 and 1967. Counts 7, 8 and 9 charged Ben Slutsky with wilfully attempting to evade personal income taxes for the years 1965, 1966 and 1967.

stated above were the result of wilful fraud. In support of that theory, the government adduced evidence describing the Nevele's bookkeeping and accounting procedures. Ideally, all guest charges—the basic form of the Nevele's income—would be recorded as received in a "bill book". At the end of each day, Julius Slutsky would reconcile the bill book with the physical cash received. He personally prepared the deposit slips. An adding machine tape showing the total would then be given to Greco, the bookkeeper, who thereafter would post the receipts in a cash on hand account in the Nevele's books. As the receipts were deposited in one or more of the bank accounts, or otherwise disbursed, the disposition of the funds presumably would be posted accordingly—i.e., by crediting the cash on hand account and debiting the appropriate disbursal account. The government's evidence showed, however, that with respect to bank deposits only those deposits in one of the three accounts in the name of the Nevele were properly recorded.

The government's essential claim was that the unrecorded accounts served to mask large sums of money which constituted income to the partnership. The evidence showed that, while the cash on hand account was the principal stage at which the fraud was committed, the internal accuracy of that bookkeeping account nevertheless was preserved by a system of parallel entries. Thus, certain cash receipts deposited in the recorded accounts would not be posted in the cash on hand account; but subsequent deposits in the unrecorded accounts, in corresponding amounts, were duly noted in the cash on hand account. This, according to the government's evidence, resulted in appellants purporting to show that the amounts deposited in the unrecorded accounts had been properly recorded as income.[5]

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5 This apparently is what confronted Agent Wood upon her initial discovery of the unrecorded accounts. According to her trial testimony,

Appellants, on the other hand, while admitting the irregularities in the treatment of deposits in the unrecorded accounts, vigorously disclaimed the inference of fraud urged by the government. They contended that there was no evidence of any receipts not recorded as income in the cash on hand account and that, by charging as income the deposits in the personal accounts *plus* the total in the cash on hand account, the government had computed over $1 million in receipts twice, thus resulting in the alleged deficiency. Moreover, appellants argued that the government's own proof demonstrated the built-in inaccuracy in the cash on hand account which resulted in computations known by the government to be in error throughout.

The remainder of the evidence, particularly that bearing on the bases for the government's computations and the details of the cash on hand account, we discuss later in this opinion in connection with our consideration of the sufficiency of the evidence. The case was submitted to the jury on the bank deposits method. The jury found appellants guilty on all counts. This appeal followed.

II.

Venue

Before turning to the sufficiency of the evidence, we shall consider a preliminary question raised by appellants: whether the district court erred in denying appellants' pretrial motion to dismiss for improper venue. The claim is that, while the returns involved in the instant indictment were prepared and signed in the Southern District of New York, they were filed at the IRS Regional Center at Albany in the Northern District of New York. Appellants contend

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"[A]t that point it appeared that our review of the cash of the bill books and the deposits that were being recorded in the cash receipts book that at that point that this money had gone into income."

that, since the offenses charged were not "committed" within the meaning of Fed. R. Crim. P. 18[6] until the returns were filed at Albany, the prosecution should have been in the Northern District.

We disagree.

With respect to counts 1—3 charging appellants with making and subscribing to false partnership returns in violation of 26 U.S.C. §7206(1), the law in this Circuit is settled that venue properly lies where a false statement is prepared and signed, even though received and filed elsewhere, by operation of the "continuing offense" statute.[7] See, e.g., *United States* v. *Miller*, 246 F.2d 486, 487-88 (2 Cir.), *cert. denied*, 355 U.S. 905 (1957). This is consonant with the view that the "statutory key verbs" control in determining venue. See *United States* v. *Hagan*, 306 F.Supp. 620, 621-22 (D.Md. 1969) (Thomsen, *Chief Judge*). Here, the key words in the statute are "makes and subscribes" a false return—acts charged as having been done in the Southern District of New York. Venue accordingly was proper in that district.

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6 Fed. R. Crim. P. 18 provides:

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

7 18 U.S.C. §3237(a) (1970) provides:

"Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

We reach the same conclusion with respect to counts 4—9 charging wilful attempts to evade taxes in violation of 26 U.S.C. §7201. In *United States* v. *Gross*, 276 F.2d 816, 818-20 (2 Cir.), *cert. denied*, 363 U.S. 831 (1960), relying upon the continuing offense doctrine, we held that venue was proper in the district in which the returns forming the basis of the tax evasion charge had been prepared, even though they were signed and filed elsewhere.

That rationale is of equal force here.[8] In addition to the preparation of the returns in the Southern District, appellants signed them there. That provides a further significant contact and reinforces the *Gross* analysis. Moreover, while the indictment charged appellants with filing false returns, the offense here under consideration was the wilful attempt to evade their tax obligations. Under 18 U.S.C. §3237(a), venue will lie wherever the attempt to evade taxes was begun, continued, or completed.

We hold that the preparing and subscribing of the returns in the Southern District made venue in that district proper.[9]

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8 *Travis* v. *United States*, 364 U.S. 631 (1961), is not to the contrary. While that case held that the alleged violation of 18 U.S.C. §1001 (making false statement) could be prosecuted only in the districts in which the affidavits had been filed, the decision surely was meant to be confined to the facts based on the unusual statute involved.

9 We further note the absence of any prejudice to appellants as the result of venue in the Southern District. Appellants do not claim that the prosecution there rather than in the Northern District created any difficulty in obtaining witnesses or documents, or indeed that any additional expense was incurred. Further, under 18 U.S.C. §3237(b), a person charged with violations of 26 U.S.C. §§7201 and 7206(1) may "elect to be tried in the district in which he was residing at the time the alleged offense was committed." In this case, that was the Southern District. We surmise that by bringing the action in the Southern District in the first instance the government avoided a likely motion to transfer under Section 3237(b).

III.

Sufficiency of the Evidence

(A) *Adequacy of investigation*

In utilizing the bank deposits method of proof, the government necessarily relied on circumstantial evidence. *United States* v. *Doyle*, 234 F.2d 788, 793 (7 Cir.), *cert. denied*, 352 U.S. 893 (1956). That imposes on us in reviewing the convictions below the duty of "bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method [as with the 'net worth' method] that is itself only an approximation." *Holland* v. *United States*, 348 U.S. 121, 129 (1954). In the context of this case, we direct our attention particularly to the adequacy of the foundation underlying the computations introduced by the government and the propriety of the investigation that led to those computations. We hold that the bank deposits method of proof in this case complied with the requirements of law and adequately supported the jury verdicts that resulted.

The requirement of a full and adequate investigation in a bank deposits case is based on the similar requirement in a net worth case. *Holland* v. *United States*, *supra*. Such investigation must establish a guarantee of essential accuracy in the circumstantial proof at trial as an element of the government's burden of proving guilt beyond a reasonable doubt. *Kirsch* v. *United States*, 174 F.2d 595, 601 (8 Cir. 1949). Once the government satisfies its burden of proving substantial deposits in excess of reported income, has given the taxpayer credit for properly claimed and otherwise allowable deductions, and shows that it has taken all reasonable steps to eliminate identifiable non-income items, the burden is then on the taxpayer to explain the remaining excess. *United States* v. *Lacob*, 416

F.2d 756, 760 (7 Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970).

Having these requirements in mind, we must examine the adequacy of the government's investigation. The record shows that, as a result of the IRS' examination of the six bank accounts within appellants' control, it made the following analysis:

1. *Checking account in name of "The Nevele" at Sullivan County National Bank.*

   With the exception of two unidentified items totalling some $2,000, every item of the total $1,661,639.08 deposited in this account during the three taxable years was analyzed. More than $1.5 million was identified as non-income. The remainder was charged as income.

2. *Checking account in name of "The Nevele" at First National Bank and Trust of Ellenville.*

   Of the total $1,710,083.34 deposited in this account, more than $550,000 was identified as income to the Nevele. That figure comprised 788 individual items of which 678 were items under $1,000. The IRS' investigation of this account entailed an analysis of every item over $1,000 (with the exception of approximately $11,000), and a random analysis of items under $1,000. Only $13,456.78 of the total deposits was identified and eliminated as non-income.

3. *Checking account in name of "The Nevele" at Ellenville National Bank.*

   In this, the major business account, more than $13 million was deposited during the three years in question.

Of the items over $1,000, the IRS analyzed all but $4,000. In addition, of the items under $1,000 (all of which had a number encircled on the back of the checks),[10] some 769 were randomly analyzed. The result was the elimination of almost $3.8 million as non-income, the identification of over $800,000 as income, and the further charging as income of almost $7.5 million in unidentified items under $1,000. Some $1 million in currency deposited in this account was also charged as income.

4. *Savings account in name of "Ben or Julius Slutsky" at Ellenville National Bank.*

   Of the total $996,297.82 deposited in this account, every item was identified. $19,500 was eliminated as non-income. The remainder was charged as income.

5. *Checking account in name of "Julius or Alice Slutsky" at Ellenville National Bank.*

   Of the total $326,687.75 deposited in this account, every item was identified. More than $230,000 was eliminated as non-income. The remainder was charged as income.

6. *Checking account in name of "Alice Slutsky" at Ellenville National Bank.*

   Of the total $360,929.44 deposited in this account, every item was identified. More than $170,000 was eliminated as non-income. The remainder was charged as income.

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10 Irving Greene, the Nevele's front office manager, testified that a cashier, upon receiving a check from a guest leaving the hotel, was instructed to write the guest's room number on the back of the check and encircle that number.

In sum, of approximately $18 million in total deposits during the three years involved, more than $5.7 million was eliminated as non-income,[11] and the remainder was charged as gross income for purposes of the bank deposits analysis. Of the total charged as income, almost $2.8 million was in specifically identified items. Almost $8.6 million, however, was in unidentified items, and a further $1 million was in currency. Appellants' principal attack on the sufficiency of the government's investigation focuses on this large sum of unidentified checks and currency charged as income.

The adequacy of a bank deposits investigation necessarily turns on its own circumstances. The reported cases indicate the kinds of factors that bear on the assessment of adequacy. The critical question is whether the government's investigation has been sufficiently adequate to support the inference that the unexplained excess in receipts was in fact attributable to currently taxable income. *Holland* v. *United States*, *supra*, 348 U.S. at 137. In proving its case, the government is not required to negate all possible non-income sources of the deposits, particularly where the source of the income is uniquely within the knowledge of the taxpayer. At the same time, however, the government may not "disregard explanations of the defendant reasonably susceptible of being checked". *Id.* at 138.

Thus, in *United States* v. *Lacob*, *supra*, the court upheld as adequate an investigation involving total deposits of $99,000 by a lawyer who specialized in personal injury claims with fees ranging from 20% to 33⅓%. There, "[o]f $39,356.33 of substantial checks deposited but not identified or explained, defendant was charged with income of $7,871.27, or 20%, because it was assumed, in the absence

11 In addition to the $5.7 million eliminated as the result of the government's own investigation, some $180,000 attributed to "leads" and $47,000 attributed to "guest returns" were also eliminated.

of other proof, that these were proceeds of cases. . . ." 416 F.2d at 758. Similarly, in *United States* v. *Procario*, 356 F.2d 614 (2 Cir.), *cert. denied*, 384 U.S. 1002 (1966), where almost half of the total alleged professional receipts were in the form of deposits unidentified by the government, we said:

> "The government relied on the fact that it excluded all possible dividends, on the small size and relative frequency of the deposits, similar to deposits and other income proven to be professional receipts, and on the fact that appellant had patients other than those whose payments were included in . . . the directly proven items of income. This was sufficient." 356 F.2d at 618.

We hold that the government's investigation here was clearly sufficient under the particular circumstances of the case.[12] Analysis of the nature of the business in which appellants were engaged revealed that most income items were in amounts under $1,000. Accordingly, the investigation included a detailed check of every item in an amount greater than $1,000, with very few specified exceptions. In addition, a random check of 1447 items in amounts less than $1,000 was made; and the analyzed items were found to constitute income in virtually every instance. Moreover, a further examination of the business accounts disclosed that almost every item in an amount under $1,000 was reflected by a check with a room number encircled on the back; according to the record, this specifically identified these items as guest receipts and therefore income. To

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12 Appellants' contention to the contrary is undermined to a significant degree by the testimony of Nathan Frankel, an accountant who conducted a two-year investigation of appellants' books after being retained by appellants. Frankel testified that he discovered even fewer non-income items than had the government. And significantly he did not check *any* of the reported accounts despite assistance by a staff of eight.

hold the government to a stricter duty of investigation than it performed here would be to ignore both the "reasonableness" and "fairness" strictures that have been imposed; it would also result in an exercise in diminishing returns in terms both of the provision of relevant information to the fact-finder and of the protection of the rights of taxpayers.

Appellants' attack upon the sufficiency of the government's investigation appears further to have misconstrued the essence of the bank deposits method of proof. "[*O*]*nce the Government proves unreported receipts having the appearance of income*, and gives the defendant credit for the deductions he claimed on his return, as well as any others it can calculate without his assistance, *the burden is on the defendant to explain the receipts, if not reportable income*, and to prove any further allowable deductions not previously claimed." *United States* v. *Lacob*, *supra*, 416 F.2d at 760. (emphasis added). Put another way, once the existence of unreported receipts is established, "the defendant remains quiet at his peril." *Holland* v. *United States*, *supra*, 348 U.S. at 139. Proof of the exact amount of the understatement is not required, *United States* v. *Johnson*, 319 U.S. 503, 517 (1934); *United States* v. *Pawlak*, 352 F.Supp. 794, 796 (S.D.N.Y. 1972), nor is there any duty to negate all non-income sources of unreported receipts. *United States* v. *Doyle*, *supra*, 234 F.2d at 794. Once the government showed that appellants' accounting system was such as to permit the non-disclosure of income, as well as the existence of substantial amounts of excess deposits which, after reasonable investigation, had the appearance of income, that was sufficient to warrant submitting the case to the jury.

We hold that the government adequately sustained its burden in this case.

(B) *Opening Cash On Hand*

As in a net worth case, *Holland* v. *United States, supra,* 348 U.S. at 132-35, an essential element of the government's burden of proof in a bank deposits case is to establish an accurate cash on hand figure for the beginning of the taxable year. If the taxpayer's deposits or other expenditures during the relevant year "came from a safety deposit box in a bank or from a hoard at home, obviously they are not 'income' when taken from their storage place and deposited in a checking account nor when spent." *United States* v. *Frank,* 245 F.2d 284, 287 (3 Cir.), *cert. denied,* 355 U.S. 819 (1957). Thus, the government must prove with reasonable certainty the amount of undeposited cash at the beginning of the year so that an appropriate amount may be subtracted from the total of deposits made during the taxable year.[13]

In the instant case, the government alleged cash on hand at the beginning of 1965 of $78,688.84, a figure taken directly from the Nevele's general ledger. Appellants mount a two-tiered attack on that figure. First, they contend that the government's own proof demonstrated the inaccuracy of the cash on hand account in the Nevele's books—the source of the figure used—and that therefore the proper foundation for the resulting computation is lacking. Second, they argue that the government was informed by appellants of the source of the inaccuracy and that the failure to utilize that information violated the "leads" doctrine of *Holland.*[14] We hold that the record supports the use of the opening figure relied on by the government.

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13 By the same token, the cash on hand at the *end* of the taxable year must be added to the sum of deposits to reflect the total income for that year. That procedure was followed by the government in this case.

14 At one time there was some doubt as to the applicability of the "leads" doctrine to a bank deposits case. In *United States* v. *Procario,* 356 F.2d 614, 617 (2 Cir.), *cert. denied,* 384 1002 (1966), for example,

Appellants' essential contention is that the evidence showed the inherent unreliability of the cash on hand account in that the account was not properly credited when deposits were made in any of the three accounts not recorded in the Nevele's books. This resulted, according to appellants, in a double computation of large sums of money: once in the sum of deposits in those accounts and again in the use of the cash on hand account itself as an index of receipts. Whatever merit there might be in this contention if the government had relied solely on the figure in the cash on hand account to establish an opening cash on hand amount, the record clearly demonstrates sufficient corroboration to have warranted submission of the case to the jury.

First, as stated above, the proof adduced by the government which showed the manner in which appellants were able to conceal substantial sums of income alleged to have been unreported was sufficient to demonstrate that the integrity of the cash on hand account was maintained despite its use in the fraudulent scheme. Second, and of critical importance, independent evidence was introduced by which the validity of the figure shown in the cash on hand account could be tested. Specifically, the government demonstrated that in each of the years in question the deposits in the two principal business accounts during the first few days of the new year were consistent with the amount of cash indicated in the ledger account. And, finally, the cash on hand account figure was authenticated by the in-house investigation conducted by Nathan Frankel, an accountant retained by appellants subsequent to the commencement of

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we noted the argument but found no need to resolve it upon the facts of that case. The contention that the "leads" doctrine should be confined to a net worth case is no longer tenable. See, e.g., *United States* v. *Ramsdell*, 450 F.2d 130, 133 (10 Cir. 1971); *United States* v. *Stein*, 437 F.2d 775, 778 (7 Cir.), *cert. denied*, 403 U.S. 905 (1971).

the IRS audit. Frankel, it should be noted, had the additional benefit of full access to all of the Nevele's books and records, a privilege not afforded the government.[15]

Accordingly, apart from making the opening cash on hand figure sufficiently reliable to allow the jury to consider the evidence, the factors enumerated above more than adequately negate appellants' contention that the government failed to follow up leads provided by appellants. The "leads" doctrine, as outlined in *Holland* v. *United States*, *supra*, 348 U.S. at 135-36, places on the government a duty of "effective negation of reasonable explanations by the taxpayer inconsistent with guilt"—a duty limited to the investigation of "leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence." Here, the leads furnished by appellants, such as they were, were not directed as much at the inaccuracy of the cash on hand account as against the alleged invalidity of the government's entire theory of tax evasion. In every practical sense, the ensuing investigation, which we hold to have been full and fair, consisted of a "tracking down" of the explanations offered by appellants. The essence of the government's investigation was a detailed study of the use of the cash on hand account. This led to the conclusion, bolstered by independent evidence, that the explanation offered by appellants was untrue. To require the government to do more would be to ignore the element of reasonableness embodied in the "leads" doctrine.

We hold that the government fully discharged its duty to investigate the leads furnished by the taxpayers, and that the resulting evidence was sufficient to establish with reasonable certainty the accuracy of the cash on hand figure used.

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15 The government's pre-trial motion to require production of the books was denied on the ground of appellants' privilege against self-incrimination. *United States* v. *Slutsky*, 352 F.Supp. 1105, 1108 (S.D.N.Y. 1972).

(C) *Wilfulness*

Appellants also challenge the sufficiency of the evidence of wilfulness. We hold that there was ample evidence to establish this essential element of the offenses charged.[16]

The government was required to establish beyond a reasonable doubt that appellants acted wilfully and knowingly with the specific intent to evade their income tax obligations. *United States* v. *Coblentz*, 453 F.2d 503, 505 (2 Cir.), *cert. denied*, 406 U.S. 917 (1972). That means proof of a conscious, deliberate, purposeful act or omission, as opposed to an unconscious, unwilling, negligent or mistaken one. *United States* v. *Platt*, 435 F.2d 789, 793-94 (2 Cir. 1970) (§7203 violation); *United States* v. *Berger*, 325 F.Supp. 1297, 1303 (S.D.N.Y. 1971), *aff'd*, 456 F.2d 1349 (2 Cir.), *cert. denied*, 409 U.S. 892 (1972). It was further incumbent upon the government to establish intent by evidence independent of the understatement of income. *Holland* v. *United States*, *supra*, 348 U.S. at 139.

The proof of wilfulness in this case was clearly sufficient. In the evidence from which the jury was entitled to find intent to evade taxes was the consistent pattern of understating substantial sums of income, *Holland* v. *United States*, *supra*, 348 U.S. at 139; the withholding of material information from Levis, appellants' own accountant, *United States* v. *Procario*, *supra*, 356 F.2d at 618; the withholding of material information from Agent Wood of the IRS, *United States* v. *Rischard*, 471 F.2d 105, 108-09 (8 Cir. 1973); and the resort to unorthodox accounting practices, including parallel entries, with deceptive results. *United States* v. *Waller*, 468 F.2d 327, 329 (5 Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). See also *Spies* v. *United States*, 317 U.S. 492, 499 (1943).

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16 The burden of proof on the element of intent is similar for prosecutions under both Sections 7201 and 7206(1). See generally, *United States* v. *Bishop*, —— U.S. ——, —— (1973).

In short, the independent evidence of intent, aside from the fact of understatement, was sufficient to support the jury's verdict.

IV.

Sentence

Appellants argue that, even if the proof was sufficient to support the guilty verdicts, the court erred in imposing cumulative sentences under Sections 7201 and 7206(1). We agree. Accordingly, we vacate the convictions and sentences imposed upon both appellants on the false filing counts (Counts 1, 2 and 3) which charged violations of Section 7206(1).

In *United States* v. *White*, 417 F.2d 89 (2 Cir. 1969), *cert. denied*, 397 U.S. 912 (1970), defendants similarly had been charged with violations of both Sections 7201 and 7206(1). Following the return of guilty verdicts under both sections, maximum cumulative fines were imposed on all counts. We reversed, saying that "the cumulative fines, insofar as they exceeded the maximum possible fine under the greater offense charged in §7201, constituted an unauthorized pyramiding of penalties." 417 F.2d at 93. That view was premised on *Sansone* v. *United States*, 380 U.S. 343, 349 (1965), where the Supreme Court held that Sections 7203 and 7207 are lesser-included offenses within Section 7201 in an appropriate case. Likewise, we held in *White* that "where proof of wilfully attempted evasion under §7201 also proves, as an incident to the wilful evasion, the preparing and subscribing of a fraudulent return [under Section 7206(1)], the specific form of fraudulent conduct merges into the inclusive fraud under §7201", thereby rendering improper a cumulation of penalties beyond the maximum authorized by Section 7201. 417 F.2d at 94.

The government argues that *White* does not control here because in *White* the indictment involved only individual returns, whereas here the respective counts charge independent violations of individual and partnership returns. Unlike the unitary circumstances in *White*, the government urges, "[s]igning a false partnership return (§7206(1)) is not a lesser included offense of personal tax evasion (§7201) because . . . the essential elements of each crime are different and each offense can be committed without committing the other."

The government's argument overlooks, however, the nature of a partnership return.[17] A partnership, unlike a corporation, is not in itself a taxable entity. The partners alone are liable as individuals for the income from their respective partnership shares, computed in addition to any other individual income. *Commissioner* v. *Whitney*, 169 F.2d 562, 564-65 (2 Cir.), *cert. denied*, 335 U.S. 892 (1948). The partnership returns, while required under the tax laws, are information returns only. 26 U.S.C. §6031 (1970). Equally important for present purposes, the offense of signing and filing a false partnership return is limited to the specific partner charged with those acts; neither the partnership nor the other co-partners are subject to punishment by reason of such offense. In short, we see no justification for treating the contemporaneous filing of a false partnership information return and a false individual return any differently from the filing of a false individual

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17 That the district court itself recognized the personal, as opposed to corporate, characteristics of this particular partnership is evident from its denial of the government's pre-trial motion to produce the partnership's records on the ground that the privilege against self-incrimination was held applicable. "Rather than an impersonal and detached business owned by absentees with all the aspects of a corporation, the Nevele hotel appears to be a personal family business, albeit large and successful." *United States* v. *Slutsky*, 352 F.Supp. 1105, 1108 (S.D.N.Y. 1972).

return alone. In each instance, where an indictment charges both tax evasion under Section 7201 and perjury under Section 7206(1), and the evidence at trial proves the latter as an incident of the former, "the specific form of fraudulent conduct [perjury] merges into the inclusive fraud charged under §7201." *United States* v. *White*, *supra*, 417 F.2d at 94.

We therefore hold that the cumulation of penalties beyond the maximum authorized by Section 7201 is improper. The convictions of appellants on Counts 1, 2 and 3, charging the signing and filing of false partnership returns in violation of Section 7206(1), and the sentences imposed thereon, accordingly are reversed and vacated.[18]

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18 There is some question as to the proper course that should follow our holding—i.e. whether we should vacate both the conviction and sentence on the improperly pyramided counts, or simply vacate the sentence imposed. In *White*, where fines and not prison terms were imposed, only the sentence was vacated. That procedure was criticized, however, in *United States* v. *Rosenthal*, 454 F.2d 1252, 1255 n. 2 (2 Cir.), *cert. denied*, 406 U.S. 931 (1972). There, noting the "collateral consequences of convictions", it was concluded that vacation of the conviction on the lesser count was also required. We agree with that approach, viewing the "collateral consequences" as particularly troublesome in a lesser-included offense case where such characterization necessarily presumes that Congress did not intend two punishments for the same crime. See also *United States* v. *Newman*, 468 F.2d 791, 796 (5 Cir. 1972).

Here, as in *Rosenthal*, moreover, "[t]here is no occasion to remand for resentencing since it is plain that the conviction[s] on the lesser included offense[s] did not lead the judge to impose a heavier sentence on the [§7201 counts] than he otherwise would." 454 F.2d at 1256.

Appellant Ben J. Slutsky was sentenced to three-year terms of imprisonment on each of counts 2 and 3 and to five year terms of imprisonment on each of counts 7, 8 and 9, all prison sentences to run concurrently; and he was fined $5,000 on each of counts 2 and 3, $10,000 on each of counts 7, 8 and 9, all fines being cumulative.

Appellant Julius Slutsky was sentenced to a three-year term of imprisonment on count 1 and to five-year terms of imprisonment on each of counts 4, 5 and 6, all prison sentences to run concurrently; and he

We have carefully considered the other claims of error raised by appellants, including the various charges of prejudicial error in the conduct and timing of the trial. We find them wholly without merit.

We affirm the judgments of conviction as to both appellants on Counts 4—9. We reverse and vacate the judgments of conviction and cumulative sentences imposed upon both appellants on Counts 1—3.

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was fined $5,000 on count 1, $10,000 on each of counts 4, 5 and 6, all fines being cumulative.

The net result of our vacating the convictions and sentences of both appellants on counts 1, 2 and 3 is that the remaining effective sentence for appellant Ben J. Slutsky is five years imprisonment and a $30,000 fine; that for appellant Julius Slutsky is five years imprisonment and a $30,000 fine.

Order Denying Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the THIRTY-FIRST day of OCTOBER, one thousand nine hundred and seventy-three.

United States of America,

Plaintiff-Appellee,

v.

Ben J. Slutsky and Julius Slutsky, d/b/a "The Nevele", Ellenville, New York,

Defendants-Appellants.

73-1549
73-1550

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

IRVING R. KAUFMAN
Chief Judge

Order Denying Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of October, one thousand nine hundred and seventy-three.

Present: HON. J. HOWARD LUMBARD,
HON. PAUL R. HAYS,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Ben J. Slutsky and Julius Slutsky, d/b/a "The Nevele", Ellenville, New York,
Defendants-Appellants.

73-1549
73-1550

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

APR 22 1974

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-1032

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "The Nevele",

Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR RE-HEARING

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1032

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "The Nevele",

Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR RE-HEARING

The petitioners hereby respectfully move this Court for an order vacating its denial of the petition for a writ of certiorari entered on April 14, 1974, granting the petition, and directing the review of the judgment and opinion. The reasons for this motion are that after the filing of our petition, this Court heard argument in a collection of civil tax cases which test the government's taxing powers. *Alexander* v. *"Americans United", Inc.*, 72-1371, argued January 7, 1974; *Bob Jones University* v. *Connally*, 72-1470, argued January 7, 1974; *Commissioner* v. *Idaho Power Co.*, 73-263, argued February 27, 1974; and *Kahn* v. *Shevin*, 73-78, argued February 25, 1974. Although each of these cases involve civil tax issues, the abuse of the

government's revenue powers was reviewed by this Court. The powers given the government by the Second Circuit in this case concerning the prosecution of a federal tax case present a far greater threat to every citizen than those excercised in these civil cases. For here the prosecution was allowed to convict two elderly men of tax evasion using solely the bank deposit method for reconstructing income. The dialogue of the civil cases bears directly on the underlying issues presented in this case. Thus, the identity of these basic legal issues amply justifies a reconsideration of the denial of certiorari here.

In *Lefkowitz* v. *Turley*, U.S. , 94 S. Ct. 316,* the Court re-emphasized the importance of the fifth amendment in criminal investigations. There the Court stressed that the privilege against self-incrimination protects the individual from being forced to give evidence against himself and, thus, implicitly refortified the presumption of innocence. Our central claim is that the presumption of innocence encased in the fifth amendment and firmly locked into the privilege against self-incrimination, was irreparably damaged by the Second Circuit's ruling in this case. Here the government failed to investigate most of petitioners' bank deposits. The sampling taken by the prosecution was most misleading. Thus, an intolerable burden was cast on the taxpayers to come forward and prove that tens of thousands of checks were not income. This deplorable shifting of the burden of proof creates a much greater threat to the vitality of the fifth amendment than that posed in Lefkowitz.

*Published in the West Publishing Co. advance sheets, January 1, 1972.

Conclusion

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioners pray that this Court grant a re-hearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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Certificate of Counsel

As counsel for petitioner, I hereby certify that this petition for re-hearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

HERALD PRICE FAHRINGER